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Supreme Court, U.S.
FILED
SEP 30 1997
CLERK

No. 96-8653

# In the Supreme Court of the United States

OCTOBER TERM, 1996

KEVIN D. GRAY, PETITIONER

*v.*

MARYLAND

*ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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34 pp

## QUESTION PRESENTED

Whether the Confrontation Clause of the Sixth Amendment precludes the admission at a joint trial of the confession of a non-testifying co-defendant, where the jury is instructed not to consider the confession against the defendant, and the confession is redacted to replace all incriminating references to the defendant with neutral, non-identifying terms.

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**SUPPORTING RESPONDENT**

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## INTEREST OF THE UNITED STATES

This case presents the question whether, under *Bruton* v. *United States*, 391 U.S. 123 (1968), and *Richardson* v. *Marsh*, 481 U.S. 200 (1987), a court may admit at a joint trial the confession of a non-testifying co-defendant, where the jury is instructed not to consider the confession against the defendant, and the confession is redacted to replace all incriminating references to the defendant with neutral, non-identifying terms. The proper application of *Bruton* and *Richardson* is a frequently recurring issue in federal criminal trials, and the United States partici-

pated as amicus curiae in *Richardson*. The Court's resolution of the question presented in this case will have a substantial effect on federal criminal practice.

## STATEMENT

1. On November 10, 1993, petitioner and five other young men beat Stacey Williams to death. J.A. 89. Based on information from eyewitnesses to the beat[illegible] the police identified three suspects: Anthony Bell, petitioner Kevin Gray, and Jacquin Vanlandingham. III Tr. 15-16. The police therefore obtained arrest warrants for Bell and petitioner; Vanlandingham had been fatally shot within days of the beating. *Id.* 16-17; J.A. 89.

Bell was arrested first, and he gave a written statement naming himself, Vanlandingham, and petitioner as participants in the beating. J.A. 89. Bell also indicated that "a few other guys," or "[a]bout six guys" in total, were involved in the beating. J.A. 55-56. When petitioner was later arrested, he claimed to have been on the telephone at the time of the beating. III Tr. 38.

Petitioner and Bell were scheduled for a joint trial. J.A. 89. Petitioner moved to sever his trial from Bell's or, in the alternative, to exclude Bell's confession from evidence. J.A. 4-9. The trial court denied the motions, but ordered that Bell's confession be redacted to exclude the names of petitioner and Vanlandingham. J.A. 7-9.

At trial, the State's witness Tracy Brumfield testified that she saw petitioner, Vanlandingham, and ten other young men chasing the victim down the street. J.A. 82-83. State witness Shay Yarberough, who saw the beating itself, gave the following account: Six people were involved in the attack. Vanlandingham lifted the victim over his head and dropped him to the



sidewalk, and petitioner unsuccessfully attempted the same maneuver. Petitioner, Bell, Vanlandingham, and three others repeatedly kicked the victim in the head and body. J.A. 89-90.

Bell did not testify, but his confession was read to the jury with the words "deleted" or "deletion" substituted for the names of petitioner and Vanlandingham. J.A. 10-12. A written copy of the redacted confession was also admitted into evidence, with blank white spaces substituted for the names of petitioner and Vanlandingham. J.A. 65-68. Before the confession was read to the jury, the trial court instructed the jury that the confession was admitted only against Bell and was not to be considered as evidence against petitioner. J.A. 10.

Petitioner testified in his own defense. He claimed that he was on a public phone with his girlfriend during the beating. J.A. 90. Petitioner's girlfriend testified that petitioner had called her from a public telephone and commented to her that Vanlandingham was fighting. *Ibid.* Two other defense witnesses testified that they had witnessed various parts of the beating, and that petitioner was not involved at that time, but was rather at a nearby telephone booth. J.A. 90 (Lamont Matthews); III Tr. 110-112, 116-118 (Renardo Gardner).

The jury found petitioner guilty of involuntary manslaughter. J.A. 90. He was sentenced to ten years' imprisonment with all but seven years suspended. *Ibid.*

2. Petitioner appealed, and the Maryland Court of Special Appeals reversed his conviction. J.A. 87. The court held that the introduction of Bell's redacted confession violated petitioner's Confrontation Clause rights under *Bruton* v. *United States*, 391 U.S. 123

(1968), even though the jury had been instructed not to consider the confession against petitioner. J.A. 83-85. In the court's view, the "instant case represents a point on the continuum between *Bruton* and *Richardson* [v. *Marsh*, 481 U.S. 200 (1987)] 'where one cannot have the requisite degree of assurance that the jury will not improperly consider the evidence in deciding the guilt of the defendant against whom the evidence is not admissible despite a proper limiting instruction.'" J.A. 84 (quoting *Foster* v. *United States*, 548 A.2d 1370, 1378 (D.C. 1988)). The court reasoned that despite the redaction of petitioner's name, "[i]n the context of other evidence * * * the jury need only have taken a short step in inferring that [petitioner] was one of those involved. * * * Therefore, there existed a 'substantial risk' that the jury considered the statement in deciding [petitioner's] guilt." J.A. 83-84.

3. The State of Maryland appealed, and the Court of Appeals of Maryland reinstated petitioner's conviction. J.A. 89. That court ruled that admission of a non-testifying co-defendant's redacted confession violates a defendant's Confrontation Clause rights only if, in the context of all of the evidence introduced at trial, the redacted confession compels a direct inference that the co-defendant originally incriminated the defendant. J.A. 101. The court explained that unless "[t]he compulsion to make the impermissible inference [is] compelling, inevitable, and subject to little or no debate[,] * * * the general and strong presumption that jurors follow their instructions is not overcome, and the requirements of *Bruton* are therefore satisfied." J.A. 101-102.

Applying that test, the court noted that the evidence in the present case established that at least six



individuals were involved in the attack on the decedent. The deleted names in Bell's confession "could have been any one of at least four other individuals[,] a fact emphasized by the State['s] attorney no less than three times during her final summation." J.A. 106. Accordingly, the court held that the evidence at trial did not compel the inference that Bell's confession had named petitioner, and therefore no *Bruton* violation occurred. *Ibid.*

## SUMMARY OF ARGUMENT

It is "the almost invariable assumption of the law that jurors follow their instructions." *Shannon* v. *United States*, 512 U.S. 573, 585 (1994) (quoting *Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987)). This Court has applied that principle in a wide variety of contexts, including those in which the instructions at issue required the jury not to consider, or to limit its consideration of, powerfully incriminating evidence. In *Bruton* v. *United States*, 391 U.S. 123 (1968), this Court recognized a narrow exception to that principle. The *Bruton* Court held that a non-testifying co-defendant's confession that on its face powerfully incriminated another defendant could not be admitted at a joint trial. The Court explained that a jury could not be expected to follow an instruction to disregard the facially incriminating confession of the co-defendant in considering the case against the other defendant. 391 U.S. at 126.

In *Richardson*, this Court emphasized that *Bruton* was a "narrow" decision that turned on its "precise facts." 481 U.S. at 207, 211. The Court in *Richardson* declined to extend *Bruton* to exclude co-defendant confessions that had been redacted to eliminate any reference to the name or existence of the defendant.

The Court recognized that, in context with the other evidence admitted at trial, such a co-defendant confession might incriminate the defendant if the jury violated its instructions. When a co-defendant's confession is only contextually incriminating, as opposed to incriminating on its face, however, "there does not exist the overwhelming probability" of the jury's inability to follow a limiting instruction "that is the foundation of *Bruton*'s exception to the general rule." *Id.* at 208. The Court in *Richardson* also emphasized that the "practical effects" of a contrary holding would be intolerable. *Id.* at 208-210.

*Richardson*'s reasoning fully applies to co-defendant confessions that are redacted to replace all incriminating references to another defendant with neutral, non-identifying terms. Such confessions do not have the same immediate and dramatic impact on the jury as a facially incriminating confession such as that at issue in *Bruton*. As in *Richardson*, limiting instructions can be trusted to dissuade jurors from "entering onto the path of inference" to determine whether such confessions would incriminate the other defendant if connected to other evidence at trial. 481 U.S. at 208.

The practical effects of a contrary conclusion would be no more acceptable in the present context than they were in *Richardson*. In *Richardson*, the Court noted that a contextual approach to the admissibility of redacted confessions would make it impossible to determine the admissibility of such confessions until the close of evidence, or would require pretrial hearings that would be burdensome and possibly inadequate in any event. The Court also rejected the alternatives of severance or forgoing use of the co-defendant's confession altogether. The same



considerations apply to confessions redacted to replace the defendant's name with neutral pronouns or deletions. A rule that made the admissibility of such confessions turn on the evidence admitted at trial would make prediction of the admissibility of a confession equally perilous, and pretrial hearings would be no less time-consuming and no more foolproof or feasible. Nor are the alternatives of requiring severance or prohibiting the use of co-defendant confessions at joint trials any more palatable in this context. Accordingly, the balance here should be struck in favor of the general rule that juries follow limiting instructions, just as it was in *Richardson*.

## ARGUMENT

### ADMISSION OF THE REDACTED CONFESSION OF A CO-DEFENDANT DID NOT VIOLATE PETITIONER'S CONFRONTATION CLAUSE RIGHTS

#### A. *Bruton* Is A Narrow Exception To The Presumption That Juries Follow The Court's Instructions

1. It is "the almost invariable assumption of the law that jurors follow their instructions." *Shannon* v. *United States*, 512 U.S. 573, 585 (1994) (quoting *Richardson*, 481 U.S. at 206). See also, *e.g.*, *United States* v. *Olano*, 507 U.S. 725, 740 (1993) ("[We] presum[e] that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them.") (quoting *Francis* v. *Franklin*, 471 U.S. 307, 324 n.9 (1985)).

As this Court explained in *Richardson*, this rule "is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the

belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process." 481 U.S. at 211.[1] Accordingly, the Court has adhered to the rule in a wide variety of contexts, including those in which the instructions at issue required the jury not to consider, or to limit its consideration of, powerfully incriminating evidence. For example, in *Harris* v.

[1] Petitioner's amicus, the National Association of Criminal Defense Lawyers, et al. (NACDL), refers in passing to social-science literature generally questioning the ability of jurors to understand and follow instructions. NACDL Amicus Br. 4 n.3. The cited materials do not specifically address the issue in the present case, *i.e.*, the efficacy of limiting instructions in dissuading jurors from considering evidence that, through a chain of inference, could incriminate a defendant. To the extent that amicus NACDL seeks to cast general doubt on the assumption that jurors understand and follow their instructions, this Court has emphasized that rejection of this assumption "would make inroads into th[e] entire complex code of state criminal evidentiary law, and would threaten other large areas of trial jurisprudence." *Spencer* v. *Texas*, 385 U.S. 554, 562 (1967). See also *Gacy* v. *Welborn*, 994 F.2d 305, 313 (7th Cir.) ("[The] presumption that jurors understand and follow their instructions * * * is not a bursting bubble, applicable only in the absence of better evidence. It is a rule of law—a description of the premises underlying the jury system, rather than a proposition about jurors' abilities and states of mind."), cert. denied, 510 U.S. 899 (1993). For this reason, and because of concerns about methodological flaws, courts have questioned whether social-science literature similar to that cited by amicus NACDL is relevant to the proper resolution of particular legal issues. See, *e.g.*, *Free* v. *Peters*, 12 F.3d 700, 704-706 (7th Cir. 1993) (rejecting social-science study purporting to demonstrate that jurors were not able to understand particular Illinois jury instruction; study was methodologically flawed and shed little light on likely performance of real juries), cert. denied, 513 U.S. 967 (1994).



*New York*, 401 U.S. 222 (1971), the Court held that, if a proper limiting instruction is given, a defendant's credibility may be impeached with statements taken in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), even though such statements are inadmissible as direct evidence of guilt. *Harris* necessarily rests on the view that the jury can be presumed to follow such a limiting instruction, and therefore to use the defendant's own confession solely for impeachment purposes and not as substantive evidence of the defendant's guilt. Accord *Tennessee* v. *Street*, 471 U.S. 409, 414-416 (1985) (jury can be presumed to follow instruction to consider non-testifying co-defendant's confession solely for purpose of assessing defendant's claim that his own confession was coerced).

Similarly, in *Marshall* v. *Lonberger*, 459 U.S. 422, 438 n.6 (1983), and *Spencer* v. *Texas*, 385 U.S. 554, 559-569 (1967), the Court held that juries could be presumed to follow instructions requiring them to consider evidence of a defendant's prior convictions solely in considering sentence enhancement and not in determining guilt or innocence. See also *Watkins* v. *Sowders*, 449 U.S. 341, 347 (1981) (juries could be presumed to follow instructions telling them to disregard inadmissible eyewitness evidence).

Thus, almost without exception, this Court has rejected claims that limiting or cautionary instructions are constitutionally inadequate to protect against the prejudicial potential of evidence placed before the jury in a criminal trial. As this Court stated in rejecting a defendant's claim that juries should not be given a cautionary instruction concerning the defendant's failure to testify: "The petitioner's argument would require indulgence in [the] very doubtful assumption * * * that the jurors will

totally disregard the instruction, and affirmatively give weight to what they have been told not to consider at all. Federal constitutional law cannot rest on [a] speculative assumption[] so dubious as th[is]." *Lakeside* v. *Oregon*, 435 U.S. 333, 340 (1978).[2]

2. In *Bruton*, this Court established a "narrow exception" to the general rule that juries are presumed to follow their instructions. *Richardson*, 481 U.S. at 207. At issue in *Bruton* was a confession by Bruton's co-defendant, Evans. The confession, in which Evans admitted that he and Bruton had committed an armed postal robbery, was admitted into evidence against Evans at a joint trial. 391 U.S. at 124. Although Evans's confession was admissible against Evans as an admission by a party-opponent, Fed. R. Evid. 801(d)(2), it was concededly inadmissible hearsay as to Bruton.[3] 391 U.S. at 128 n.3. Because

[2] The Court has ruled similarly when considering various non-constitutional claims resting on the contention that juries would not follow their instructions. See, *e.g.*, *Shannon* v. *United States*, 512 U.S. at 584 (jury can be presumed to follow instruction not to consider possible punishment when reaching verdict, even where insanity defense has been raised); *United States* v. *Olano*, 507 U.S. at 740 (jury can be presumed to have followed instruction that alternates not participate in deliberations); *Zafiro* v. *United States*, 506 U.S. 534, 539, 540-541 (1993) (in context of defense motions to sever pursuant to Fed. R. Crim. P. 14, "limiting instructions[] often will suffice to cure any risk of prejudice").

[3] Confessions made by a non-testifying co-defendant may in some circumstances be admissible against both the co-defendant and other defendants. See *Williamson* v. *United States*, 512 U.S. 594, 603 (1994) (self-incriminating portions of confessions may be admissible as statements against penal interest, Fed. R. Evid. 804(b)(3)); *Cruz* v. *New York*, 481 U.S. 186, 193-194 (1987) (non-testifying co-defendant's confession might be admissible against defendant in some circumstances). In the present case, as in *Bruton*, no argument was made that the non-testifying co-defendant's confession was admissible, in whole or in part, against the complaining defendant.



Evans did not testify at trial, the admission of his confession against Bruton would have violated Bruton's rights under the Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment. *Richardson*, 481 U.S. at 206.

In an effort to avoid any Confrontation Clause problem, the trial court instructed the jury that it could consider Evans's confession solely against Evans, and that it should disregard the confession in determining Bruton's guilt or innocence. *Bruton*, 391 U.S. at 125 & n.2. Applying the presumption that the jury followed the limiting instruction, "no question would [have] arise[n] under the Confrontation Clause, because by hypothesis the case [would have been] treated as if the confessor made no statement inculpating the nonconfessor." *Bruton*, 391 U.S. at 126. The Court held in *Bruton*, however, that

> there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial.

*Id.* at 135-136 (citations omitted). In that context, the Court concluded that it could not "accept limiting

instructions as an adequate substitute for [Bruton's] constitutional right of cross-examination." *Id.* at 137. The Court therefore reversed Bruton's conviction.[4] *Ibid.*

*Bruton* did not cast doubt on the general rule that juries are presumed to follow their instructions. To the contrary, the Court "agree[d] that there are many circumstances in which this reliance [on the rule that jurors are presumed to follow their instructions] is justified." 391 U.S. at 135. The Court's subsequent decisions have confirmed the narrow scope of the decision in *Bruton*. See pp. 7-10, *supra*. In one of those decisions, moreover, the Court specifically noted that the "assumption that jurors are able to follow the court's instructions fully applies when rights guaranteed by the Confrontation Clause are at issue." *Street*, 471 U.S. at 415 n.6. The most important illustration of the limited nature of the holding in *Bruton*, however, is this Court's decision in *Richardson*.

3. *Richardson* involved an armed robbery and double murder committed by three people: Marsh, Williams, and Martin. *Richardson*, 481 U.S. at 202.

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[4] *Bruton* relied heavily on *Jackson* v. *Denno*, 378 U.S. 368 (1964), in which the Court held unconstitutional the practice of leaving to the jury the question whether a defendant's confession was involuntary. *Jackson*, like *Bruton*, turned on the Court's concern that limiting instructions might be inadequate in a specific context to prevent juries from considering powerfully incriminating evidence. See *Watkins* v. *Sowders*, 447 U.S. at 347 ("The Court in *Jackson* did reject the usual presumption that a jury can be relied upon to determine issues according to the trial judge's instructions, but the Court did so because of the peculiar problems the issue of the voluntariness of a confession presents.").



Marsh and Williams were tried together. Williams had made a post-arrest statement implicating all three participants. At trial, Williams declined to testify, but his confession was admitted into evidence with a limiting instruction that it was not to be considered against Marsh. The confession was also redacted to eliminate any reference to Marsh's existence or her role in the crime. *Id.* at 203. Nonetheless, when linked to other evidence introduced at trial, the confession incriminated Marsh as to the critical element of intent.[5] *Id.* at 206. The Sixth Circuit reversed Marsh's conviction, holding that "in determining whether *Bruton* bars the admission of a nontestifying codefendant's confession, a court must assess the confession's 'inculpatory value' by examining not only the face of the confession, but also all of the evidence introduced at trial." *Id.* at 205-206 (citing *Marsh* v. *Richardson*, 781 F.2d 1201, 1212 (6th Cir. 1986)).

This Court reversed, specifically rejecting the Sixth Circuit's "contextual implication" or "evidentiary linkage" approach to the resolution of *Bruton* questions. 481 U.S. at 206-211. The Court first explained that the decision in *Bruton* represented only a "narrow exception" to the principle that jurors follow their instructions. *Id.* at 207. The confession in *Richardson* fell "outside th[at] narrow exception,"

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[5] Williams's confession described a conversation Williams had with Martin as they drove to the scene of the crime, during which Martin said that he would have to kill the victims after the robbery. Although the redacted confession did not mention that Marsh was also in the car during this time, Marsh took the stand and testified that she was in the back seat of the car as the three of them drove to the scene of the crime. *Richardson*, 481 U.S. at 204.

because it "was not incriminating on its face, and became so only when linked with evidence introduced later at trial." *Id.* at 208.

As the Court explained, "[s]pecific testimony that 'the defendant helped me commit the crime' is more vivid than inferential incrimination, and hence more difficult to thrust out of mind." 481 U.S. at 208. In contrast, "with regard to inferential incrimination the judge's instruction may well be successful in dissuading the jury from entering onto the path of inference in the first place, so that there is no incrimination to forget." *Ibid.* Thus, "[w]here the necessity of [inferential] linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence." *Ibid.* The Court concluded that, "[i]n short, while it may not always be simple for the members of a jury to obey the instruction that they disregard an incriminating inference, there does not exist the overwhelming probability of their inability to do so that is the foundation of *Bruton*'s exception to the general rule." *Ibid.*

The Court in *Richardson* also emphasized that its conclusion rested significantly on the "practical effects" of adopting a "contextual implication" approach. 481 U.S. at 208-210. The Court's main concern was that adopting such an approach would make it impossible "to predict the admissibility of a confession in advance of trial," since the trial judge would presumably be obliged to "assess at the end of each trial whether, in light of all of the evidence, a nontestifying codefendant's confession has been so 'powerfully incriminating' that a new, separate trial is required for the defendant." *Id.* at 209. Such an approach "obviously lends itself to manipulation by



the defense—and even without manipulation will result in numerous mistrials and appeals." *Ibid.* Moreover, pretrial hearings to attempt to predict the outcome of a "contextual implication" analysis would be "time consuming and obviously far from foolproof," and would require that the prosecution and the defense reveal the evidence they planned to introduce at trial, a procedure that was of doubtful feasibility in light of the limited scope of pretrial discovery under the Federal Rules of Criminal Procedure. *Ibid.*

The Court also rejected as unacceptably costly two other ways of avoiding the risks of reversal under a "contextual implication" approach: requiring severance in all cases involving a confession by one of the defendants, or prohibiting the use of co-defendant confessions at joint trials. 481 U.S. at 209-210. Joint trials, the Court pointed out, "play a vital role in the criminal justice system."[6] *Id.* at 209. The cost of prohibiting the use of co-defendant confessions would also be "too high, since confessions 'are more than

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[6] As the Court explained,

> It would impair both the efficiency and the fairness of the criminal justice system to require, in all these cases of joint crimes where incriminating statements exist, that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand. Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability—advantages which sometimes operate to the defendant's benefit.

481 U.S. at 210.

merely "desirable"; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law.'" *Id.* at 210 (quoting *Moran* v. *Burbine*, 475 U.S. 412, 426 (1986)).

### B. *Bruton*'s Narrow Exception Should Not Be Extended To Confessions That Have Been Redacted To Replace All Incriminating References To The Defendant With Neutral, Non-Identifying Terms

The issue in this case is one the Court expressly left open in *Richardson*, 481 U.S. at 211 n.5: whether the narrow exception created in *Bruton* extends to cases in which a non-testifying co-defendant's confession has been redacted to replace all incriminating references to the defendant with neutral, non-identifying terms. *Richardson* makes clear that the resolution of this issue turns on the balance between two factors: the risk that a jury would disregard a proper limiting instruction, and the "practical effects" of a rule that would hold such redaction insufficient. 481 U.S. at 208, 211. See also *Street*, 471 U.S. at 415 ("[T]he question is * * * whether, in light of the competing values at stake, we may rely on the crucial assumption that the jurors followed the instructions given them by the trial judge.") (internal quotation marks omitted). The balance should be struck here as it was in *Richardson*. A non-testifying co-defendant's confession redacted to replace all incriminating references to the defendant with neutral, non-identifying terms is admissible at a joint trial, because it does not create an "overwhelming probability" that a jury would disregard a limiting instruction, and the "practical effects" of adopting a



"contextual implication" approach would be as unacceptable as they were in *Richardson*.[7]

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[7] That is the view of the overwhelming majority of the federal courts of appeals. See *United States* v. *Williams*, 936 F.2d 698, 700-701 (2d Cir. 1991); *United States* v. *Vogt*, 910 F.2d 1184, 1191-1192 (4th Cir. 1990), cert. denied, 498 U.S. 1083 (1991); *United States* v. *Jimenez*, 77 F.3d 95, 98-99 (5th Cir. 1996); *United States* v. *Sherlin*, 67 F.3d 1208, 1215-1216 (6th Cir. 1995), cert. denied, 116 S. Ct. 795, 1548 (1996); *United States* v. *Banks*, 78 F.3d 1190, 1200 (7th Cir.), cert. granted, vacated, and remanded on other grounds, *sub nom. Mills* v. *United States*, 117 S. Ct. 478 (1996), aff'd on remand, No. 94-2788, 1997 WL 450074 (7th Cir. Aug. 8, 1997); *United States* v. *Jones*, 101 F.3d 1263, 1269-1270 (8th Cir. 1996), cert. denied, 117 S. Ct. 1346, 1566 (1997); *United States* v. *Hoac*, 990 F.2d 1099, 1105-1106 (9th Cir. 1993), cert. denied, 510 U.S. 1120 (1994); *United States* v. *Green*, 115 F.3d 1479, 1483-1486 (10th Cir. 1997), petition for cert. pending, No. 97-5829. Two of these circuits, however, generally insist that redaction be performed in such a way that the jury would not realize that the confession had been redacted. See, *e.g.*, *United States* v. *Long*, 900 F.2d 1270, 1280 (8th Cir. 1990); *United States* v. *Alvarado*, 882 F.2d 645, 653 (2d Cir. 1989), cert. denied, 493 U.S. 1071 (1990). See also pp. 21-22 n.11, *infra*. The D.C. Circuit and the First Circuit have expressly described the issue as open. See *United States* v. *Applewhite*, 72 F.3d 140, 145-146 (D.C. Cir. 1995), cert. denied, 116 S. Ct. 1864 (1996); *United States* v. *Smith*, 46 F.3d 1223, 1228 n.1 (1st Cir.), cert. denied, 116 S. Ct. 176 (1995). The Third Circuit does not appear to have addressed the question since *Richardson* was decided, although a pre-*Richardson* case decided by that court sitting in banc rejected a "contextual implication" approach. *United States* v. *Belle*, 593 F.2d 487, 494 ("In short, evidentiary linkage or contextual implication may not be utilized to convert a non-*Bruton* admissible statement into a *Bruton* inadmissible statement."), cert. denied, 442 U.S. 911 (1979). Only the Eleventh Circuit has explicitly adopted a form of "contextual implication" analysis, holding that a redacted confession that refers to other defendants only through the use of neutral, non-identifying terms will violate

1. The confession at issue in *Bruton* directly and expressly incriminated the complaining defendant. *Bruton* turns critically on the concern that jurors cannot reasonably be expected to "thrust out of mind" such "vivid" and "powerfully incriminating" evidence when assessing the guilt of the complaining defendant. *Richardson*, 481 U.S. at 208. The confession at issue in *Richardson*, in contrast, made no reference to the complaining defendant, and incriminated her only when considered in connection with other evidence introduced at the trial. *Ibid.* In that context, the Court held, a limiting instruction "may well be successful in dissuading the jury from entering onto the path of inference in the first place." *Ibid.* Confessions in which all incriminating references to the complaining defendant are replaced with neutral, non-identifying terms are comparable in effect to the confession at issue in *Richardson*.[8]

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*Bruton* if other evidence "compels a direct implication of the complaining defendant[s]." *United States* v. *Tapia*, 59 F.3d 1137, 1142 n.5 (internal quotation marks omitted), cert. denied, 116 S. Ct. 401, 546 (1995). A recent decision, however, suggests that the Eleventh Circuit's position with respect to "contextual implication" may not be entirely clear. See *United States* v. *Adams*, 74 F.3d 1093, 1098-1099 (1996) (in case where non-testifying co-defendant's confession contained express reference to defendant Adams, but reference was not facially incriminating, no *Bruton* error; "No *Bruton* violation occurred because the statement was not facially incriminating. It was not facially incriminating because the reference to the bank account required linkage to other evidence.").

[8] Amicus NACDL suggests that confessions redacted in that way might still be easily connected to the complaining defendant, because they might contain incriminating references to him in the form of initials, nicknames, or physical descriptions. Br. 11 (citing *Harrington* v. *California*, 395 U.S.



Such confessions do not have the immediate and dramatic impact of a facially incriminating confession. Rather, before a jury could use such a confession to incriminate a complaining defendant, the jury would have to review the confession's descriptions of the conduct of the unidentified person or persons, compare those descriptions with the testimony of other witnesses about what the complaining defendant said and did, and determine whether and to what extent the actions of any of the unidentified persons recounted in the confession coincide with the evidence about the role of the complaining defendant. Refraining from that form of deductive reasoning is no more difficult than the task demanded of jurors by many limiting instructions.[9] As in *Richardson*, there

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250, 253 (1969) (assuming *Bruton* violation where confessions of non-testifying co-defendants referred to defendant not by name, but as "white guy," and described defendant's age, height, weight, and hair color)). The lower courts have been alert to that concern, however, and in general have appropriately required that all references that readily identify and incriminate the complaining defendant—including names, nicknames, initials, and physical descriptions—be replaced with neutral, non-identifying terms. See, *e.g.*, *United States* v. *Kreiser*, 15 F.3d 635, 639 (7th Cir. 1994) ("Simply put, there is no *Bruton* problem when the substitution—here, the word 'source'—does not identify the nonconfessing codefendant by race, age, size, or any other means except (though not relevant here) gender.").

[9] Even where the inference is relatively obvious, jurors cannot draw it without speculating about the identities of unnamed actors or filling in the blanks of the confession, and, contrary to their instructions, then applying that "restored" confession in considering the case against the defendant. In any event, often, as here, such lines of inference would be quite unrewarding. Although Bell's redacted confession would have permitted the jury to conclude that Bell had named at least

is therefore no sufficient reason to believe that a limiting instruction will prove inadequate to dissuade jurors from engaging in that analytical process.[10]

Redacted confessions that are not facially incriminating differ from the confession at issue in *Bruton* in another critical respect. In *Bruton*, the Court was concerned that a jury would be unable to follow a limiting instruction that required it simultaneously to consider a confession to determine the guilt of one defendant but ignore it as to another defendant whom it directly and powerfully incriminated. 391 U.S. at 131 ("A jury * * * cannot determine that a confession is true insofar as it admits that A has committed criminal acts with B and at the same time effectively ignore the inevitable conclusion that B has committed

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some specific people who participated with him, the actions attributed to those people did not coincide in any distinctive way with the government's evidence against petitioner. More generally, the issue for the jury in this case was whether it should believe the government witnesses, who identified petitioner as one of the individuals involved in the beating, or the defense witnesses, who placed him elsewhere. The jury would have had no way of knowing whether Bell named petitioner as one of those individuals—thus giving an account consistent with the testimony of the government witnesses—or whether he did not—thus giving an account consistent with the testimony of the defense witnesses.

[10] A different conclusion might obtain if a prosecutor directly informed the jury, for example in closing argument, that a redacted confession had originally named the defendant. Cf. *Richardson*, 481 U.S. at 211. Contrary to the belated assertion of petitioner and his amicus (Pet. Br. 17; NACDL Amicus Br. 13-14), nothing of the sort occurred in the present case. In the disputed remark, to which no objection was made, the prosecutor simply summarized the evidence against petitioner and Bell; she did not explicitly suggest that Bell's confession originally named petitioner. IV Tr. 123.



those same criminal acts with A.") (quoting *People* v. *Aranda*, 407 P.2d 265, 272 (Cal. 1965)). No comparable problem exists with respect to redacted confessions that are not facially incriminating. In this case, for example, the jury could easily use Bell's confession to determine Bell's guilt without attempting to determine whether, considered in light of the other trial evidence, that confession might have implications for petitioner.

For these reasons, confessions that are not facially incriminating do not present the "overwhelming probability" that jurors could not follow a limiting instruction that was the basis of the ruling in *Bruton*. *Richardson*, 481 U.S. at 208. See, *e.g.*, *United States* v. *Banks*, 78 F.3d 1190, 1199-1200 (7th Cir.) ("[T]hese nonspecific references to other, nameless actors do not present the type of 'facially incriminating' references that the Supreme Court found in *Bruton* to warrant a departure from the general presumption that juries follow their limiting instructions."), cert. granted, vacated, and remanded on other grounds *sub nom. Mills* v. *United States*, 117 S. Ct. 478 (1996), aff'd on remand, No. 94-2788, 1997 WL 450074 (7th Cir. Aug. 8, 1997).[11]

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[11] In arguing that redactions that replace all incriminating references are inadequate, petitioner and his amicus focus primarily on redactions that use substitute neutral terms such as "deleted," thereby alerting the jury that names have been redacted from the non-testifying co-defendant's confession. Pet. Br. 15; NACDL Amicus Br. 11-12, 14-15. Petitioner is not in a position to complain about that aspect of the redaction of Bell's confession. The trial court made clear its willingness to redact the confession in this case to remove all references to petitioner, and invited petitioner to make suggestions about the manner of the redaction. 6/17/94 Tr. 52. Although petitioner

2. The holding in *Richardson* also reflects the Court's conclusion that making the admissibility of redacted confessions turn on the evidence admitted at trial would have unacceptable "practical effects." 481 U.S. at 208-210. The practical costs of a contextual approach are equally unacceptable in the present setting.

In some cases, a non-testifying co-defendant's confession can appropriately be redacted to remove any references to the actions of other defendants. Often,

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objected generally to the admission of the confession, even in redacted form (I Tr. 33-35; IV Tr. 133), he never suggested that the redaction was problematic because it indicated to the jury that redaction had occurred.

More generally, although accomplishing redaction in a way that is not apparent to the jury may be desirable and feasible in some circumstances, it will not always be. For example, such redaction may be infeasible in cases involving audiotaped or videotaped statements. In any event, the mere fact that the jury would be aware that redaction has occurred does not create an "overwhelming probability" that the jury would disregard a limiting instruction. See, *e.g.*, *United States* v. *Applewhite*, 72 F.3d 140, 145-146 (D.C. Cir. 1995) (no *Bruton* violation although jury was aware that non-testifying co-defendant's confession had been redacted to remove name of confederate, and other pieces of evidence permitted inference that redacted name was defendant's), cert. denied, 116 S. Ct. 1864 (1996). Although some courts have thought it important to prevent the jury from realizing that redaction has occurred, see, *e.g.*, *United States* v. *Long*, 900 F.2d 1270, 1280 (8th Cir. 1990), it is not apparent why the likelihood of jury speculation about the identity of unnamed persons would turn materially on whether the confession was originally ambiguous or subsequently redacted. Any remaining concern about the jury's knowledge of the redaction could be addressed by a instruction specifically directing the jury not to speculate about the reasons for the redaction.



however, such redaction would render the redacted confession confusing or even misleading.[12] In this case, for example, it is difficult to imagine how Bell's confession could have been redacted to remove all incriminating references to anyone other than Bell without leaving the confession unintelligible or potentially misleading as to Bell's involvement. That may be why amicus NACDL—although professing adherence to a rule flatly prohibiting references to anyone other than the declarant—does not attempt to perform such a redaction on Bell's confession in this case, instead proposing a redaction that includes numerous incriminating references to others, and simply uses plural pronouns (such as "we") rather than "deleted" or "deletion." NACDL Amicus Br. 16-18, App. A1-A2.

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[12] See, *e.g.*, *United States* v. *Strickland*, 935 F.2d 822, 826 (7th Cir.) ("For example, under the defendants' rule, neutral pronouns could not be substituted for a declarant's repeated references to his cohorts even where, as here, the omission of such pronouns would render the statement meaningless—indeed, the more detailed and incriminating the statement, the more meaningless it would become."), cert. denied, 502 U.S. 917 (1991); *United States* v. *Myers*, 892 F.2d 642, 647-648 (7th Cir. 1990) ("Deleting all reference to another person would have made [the non-testifying co-defendant's] statement confusing, in light of the evidence that he did not act alone. Perhaps in some cases the reference could be deleted without confusion, and if so that might be the better course; it would not have been here."); *United States* v. *Washington*, 952 F.2d 1402, 1404 (D.C. Cir. 1991) (redaction of non-testifying co-defendant's confession would violate rule of completeness, Fed. R. Evid. 106, "if the redacted version 'distorts the meaning of the statement or excludes information substantially exculpatory of the [non-testifying co-defendant.]'") (quoting *United States* v. *Kaminski*, 692 F.2d 505, 522 (8th Cir. 1982)), cert. denied, 503 U.S. 1009 (1992).

These recurring concerns both explain and justify the widespread practice in the federal courts of redacting confessions to retain references to the conduct of other defendants but to remove the names of, and other identifying incriminating references to, other defendants. In cases where such redactions are used, the practical costs of adopting a "contextual implication" approach would be identical to those found too high in *Richardson*. A contextual approach would make prediction of the admissibility of a confession equally perilous, and pretrial hearings would be no less time-consuming and no more foolproof or feasible. Nor are the alternatives of severance or prohibiting the use of co-defendant confessions at joint trials any more palatable here than in *Richardson*.[13]

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[13] Amicus NACDL refers in passing to the possibility of using multiple juries to try a single case. Br. 16. That suggestion was made to the Court in *Richardson* (Resp. Br. at 44) (No. 85-1433), and was implicitly rejected as an adequate alternative. Federal and state courts have generally been quite skeptical about that relatively untried technique. See, *e.g.*, *United States* v. *Balter*, 91 F.3d 427, 434-435 n.2 (3d Cir.) (technique is "costly and unwieldy"), cert. denied, 117 S. Ct. 517, 518 (1996); *United States* v. *Rimar*, 558 F.2d 1271, 1273 (6th Cir.) (technique resulted in "instances of confusion," including "misstatements of the judge or defense counsel in referring to the attorneys or their clients by the wrong names, or confusing momentarily which jury was sitting in which case," and "the trial took somewhat longer than the nature of the charges might suggest was necessary"), cert. denied, 434 U.S. 984 (1977) & 435 U.S. 922 (1978); *Ewish* v. *State*, 871 P.2d 306, 313-314 (1994) ("The case at hand illustrates that the device can become a breeding ground for confusion in process and results alike. What should have been a relatively simple trial took four weeks to conduct in the lower court. * * * The length of the trial, the curious results of the verdicts, and the length of this appeal indicate that the multiple jury process should be engaged with great caution."), rev'd in part on other grounds on rehearing, 904 P.2d 1038 (Nev. 1995); *State* v. *Corsi*, 430 A.2d 210, 213 (N.J. 1981) ("The reason for the lack of widespread adoption of this technique [*i.e.*, the use of multiple juries] would appear to be the belief that application of appropriate safeguards necessary to protect the rights of defendants in such a trial would be more time consuming than if separate trials were ordered. In addition, inherent in such a complicated procedure is the greatly enhanced possibility of error. It seems clear, therefore, that such procedure remains the rare exception rather than the rule.").



3. Perhaps because a "contextual implication" approach cannot be squared with *Richardson*, amicus NACDL proposes instead a bright-line rule that it contends would be easy to administer: Any use of a redacted confession that refers to the existence of a defendant other than the declarant offends the Confrontation Clause. NACDL Amicus Br. 16-18. That proposal is without merit.

It is difficult to tell precisely what amicus NACDL is advocating. On one hand, amicus NACDL says that what is required is redaction that "eliminate[s] any reference to the co-defendant." NACDL Amicus Br. 18. On the other hand, amicus NACDL states that the trial court could properly have redacted Bell's confession so as to leave intact references to petitioner, so long as those references were found only in plural pronouns. *Id.* at 18, App. A1-A2.[14]

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[14] Amicus NACDL's suggestion that the redaction it proposes would have solved any Confrontation Clause problem directly contradicts the position taken by petitioner in the trial court. 6/17/94 Tr. 46, 53-55 (counsel for petitioner opposes admission of confession in redacted form, arguing that severance or exclusion was required if there was any reference to fact that group was involved in beating).

However amicus NACDL's rule is understood, it is foreclosed by *Richardson*. Amicus NACDL admits that its rule would require courts to find Confrontation Clause violations even in cases where "the likelihood that a jury will draw an inculpatory link between the accused and a co-defendant's confession is remote." NACDL Amicus Br. 19. *Richardson*, however, held that the admission of a non-testifying co-defendant's confession will violate the Confrontation Clause rights of a defendant only if there is an "overwhelming probability" that jurors will be unable to follow an instruction requiring that they consider the confession only against the declarant. 481 U.S. at 208.

The proposal of amicus NACDL amounts to a broad prophylactic rule, to be imposed upon the States as a matter of federal constitutional law, that would often be impossible to meet without rendering confessions confusing, misleading, or meaningless. The effect therefore would be to require severance (or prohibition of the use of co-defendant confessions) in many cases, to ensure against potential Confrontation Clause violations in a few. *Richardson* makes clear that the costs of such an approach are "too high." 481 U.S. at 210.[15] See also *United States* v. *Strickland*,

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[15] Amicus NACDL suggests that the unacceptable consequences of the rule it proposes could be mitigated through application of the harmless-error doctrine. Br. 19-20. Application of that doctrine, however, would do little to reduce the untoward effects of the proposed rule. The harmless-error doctrine would permit an appellate court to affirm if a trial court failed to apply the proposed prophylactic rule but there was no real threat to the defendant's Confrontation Clause rights. It would not, however, reduce the unacceptable costs that would be imposed when trial courts complied with the



935 F.2d 822, 825-826 (7th Cir.) ("Defendants proffer a rule whereby a nontestifying codefendant's statement should always be redacted to omit any and all references to codefendants on trial. * * * Such a rule, while easy to apply, would unduly handcuff the government's ability to introduce admissible confessions and statements against a declarant in a joint trial."), cert. denied, 502 U.S. 917 (1991).

4. In sum, the logic of *Richardson* compels the conclusion that the Confrontation Clause is not violated by the admission at a joint trial of a non-testifying co-defendant's confession that has been redacted to replace all incriminating references to other defendants with neutral, non-identifying terms. Confessions that are redacted in this way are not facially incriminating. Rather, they become so only if the jury draws inferences, based on other evidence at trial, to surmise the identity of unnamed persons who are discussed in the co-defendant's confessions. Whether those inferences are subtle or obvious, juries can be trusted to comply with instructions directing them to consider such confessions only against the declarant and not to use such a reconstructed confession against the other defendant.[16]

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prophylactic rule and unnecessarily ordered severance or prohibited the use of co-defendant confessions.

[16] Although it affirmed petitioner's conviction, the Maryland Court of Appeals adopted a "contextual implication" approach, holding that *Bruton* would be violated if, in the context of the other evidence at trial, a redacted confession gave rise to a "compulsion to make the impermissible inference" that was "compelling, inevitable, and subject to little or no debate." J.A. 101. The Maryland Court of Special Appeals also adopted a "contextual implication" approach, but chose a looser formulation, holding that *Bruton* is violated if there is a

## CONCLUSION

The judgment of the Court of Appeals of Maryland should be affirmed.

Respectfully submitted.

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SEPTEMBER 1997

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"substantial risk" that the jury would draw an incriminating inference from the redacted confession, considered in light of the other evidence at trial. J.A. 83. For the reasons stated in text, both variants are incompatible with the logic of *Richardson*. The looser formulation adopted by the Court of Special Appeals, however, is particularly untenable. *Richardson* held that the rule of *Bruton* applies only where there is an "overwhelming probability" that the jury could not follow a limiting instruction. 481 U.S. at 208. See also *Greer* v. *Miller*, 483 U.S. 756, 766 n.8 (1987). In light of that holding, any "contextual implication" approach would necessarily be limited to cases in which the context essentially compelled the jury to connect the redacted confession with the complaining defendant. See, *e.g.*, *United States* v. *Applewhite*, 72 F.3d 140, 145 (D.C. Cir. 1995) ("[T]he logic of *Richardson* precludes application of *Bruton* 'to a codefendant's redacted statement that is less incriminating than one that creates an inevitable association.'") (quoting *United States* v. *Washington*, 952 F.2d 1402, 1406 (D.C. Cir. 1991), cert. denied, 503 U.S. 1009 (1992)), cert. denied, 116 S. Ct. 1864 (1996).